BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BENJAMIN D. RILEY	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,018,875
	)	& 1,018,877
ADVANCED SYSTEMS HOMES, INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the July 24, 2006, Award entered by Special Administrative Law Judge Vincent L. Bogart. The Workers Compensation Board heard oral argument on November 7, 2006.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Elizabeth R. Dotson of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

Claimant initially alleged an April 11, 2003, accident, which was assigned Docket No. 1,018,875. Claimant also alleged a July 12, 2004, accident, which was assigned Docket No. 1,018,877. But at oral argument before the Board, the parties stipulated the claims should be joined and treated as one injury and claim with April 11, 2003, being designated the date of accident for purposes of computing claimant's benefits. In addition, following oral argument the parties filed with the Board a written stipulation in which the parties agreed claimant's pre-injury average weekly wage was $469.19 for the April 11, 2003, accident.

ISSUES

Claimant injured his low back working for respondent. In the July 24, 2006, Award, Judge Bogart determined claimant was entitled to receive permanent partial disability benefits under K.S.A. 44-510e for a 67.2 percent permanent disability, which was based upon a 34.4 percent task loss and a 100 percent wage loss.

Respondent and its insurance carrier contend Judge Bogart erred. They argue claimant did not make a good faith effort to find employment after recovering from his injuries. Therefore, they believe the Board should either find claimant has no wage loss or impute a post-injury wage of $360 per week. But they contend the Board should affirm the Judge's finding that claimant has sustained a 34.4 percent task loss. Accordingly, respondent and its insurance carrier request the Board to reduce claimant's award of permanent disability benefits.

Conversely, claimant contends the Board should affirm the Judge's finding of a 100 percent wage loss but increase his task loss to 60 percent, which would create an 80 percent permanent partial general disability. Consequently, claimant asks the Board to increase the award of permanent disability benefits.

The sole issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be modified.

As indicated above, these claims have been joined. Moreover, the parties have stipulated claimant injured his back working for respondent with April 11, 2003, being the appropriate date of accident in determining claimant's workers compensation benefits.

Claimant is 31 years old. Claimant did not complete high school, but at the time of his January 2006 deposition, he was awaiting results from GED testing.

Respondent, which builds prefabricated modular houses, employed claimant as a concrete foreman. On April 11, 2003, claimant injured his low back when he lifted aluminum forms used to pour foundations. Before that accident, claimant had worked for respondent for nine years.

Despite that injury, claimant continued to work for respondent performing his regular job duties. As part of his medical treatment for the April 2003 injury, claimant received a

nerve conduction study, an MRI, steroid injections and physical therapy. But on July 12, 2004, while still under medical treatment for the April 2003 low back injury, claimant re-injured or aggravated his low back when he slipped at a muddy job site. Claimant's low back and left leg symptoms returned. Claimant reported the incident to respondent and returned to the same physicians he had been treating with for his initial back injury.

After the July 2004 incident, another steroid injection was recommended. But this time Dr. Kenneth W. Johnson kept claimant off work for four weeks. Claimant had additional steroid injections and physical therapy. When Dr. Johnson released claimant to light duty work, respondent advised claimant the company could not accommodate his restrictions. Claimant continued to see Dr. Johnson, who kept claimant on light duty until August 31, 2004, when he gave claimant final restrictions. Claimant presented his final restrictions to respondent, who declined to accommodate them.

In December 2004, at the insurance carrier's request, claimant saw Dr. Wesley E. Griffitt, a neurosurgeon. Claimant testified Dr. Griffitt believed claimant was a potential candidate for a two-level fusion but the doctor would not recommend it.

Claimant last contacted respondent about returning to work in February 2005. Respondent again declined to accommodate claimant's restrictions.

When claimant last testified in early January 2006 he remained unemployed despite contacting numerous employers. According to claimant, he began searching for other employment in December 2004. He initially delayed searching for another job as he was receiving pain treatment and physical therapy. Moreover, claimant believed he would be able to return to work for respondent if he received the appropriate medical treatment.

At his August 2005 regular hearing, claimant introduced a list of approximately 160 contacts that he had made with potential employers. Claimant had also looked for job contacts in the newspaper, the phone book, and he had gone to Job Service, where he obtained a few job leads. He estimates he makes four or five job contacts per week. And in October 2005 claimant began receiving unemployment benefits, which he was still receiving when he last testified in January 2006. According to claimant, unemployment required him to make four or five job inquiries a week as well as make personal contacts.

Claimant has looked for work in Chanute, which is his hometown, Independence, Iola, and Parsons. At his January 2006 deposition, claimant introduced a list of approximately 95 additional contacts that he had made following the August 2005 regular hearing. Those contacts were made in person and by phone.

Currently, claimant has frequent discomfort and pain down the center and left side of his back that radiates down the left thigh. In addition, claimant has numbness and

tingling in his buttocks and thigh. Claimant has difficulty sitting for long periods of time and walking, bending, lifting, squatting, twisting and prolonged standing bother him. Moreover, he is currently taking Vicodin, Flexeril and Naprosyn. Respondent's insurance carrier has authorized a doctor to provide claimant's ongoing pain medication.

The primary issue in this claim is the nature and extent of claimant's injury and disability. As confirmed by an MRI, claimant has two herniated discs at L4-5 and L5-S1, plus degenerative disc disease at those levels. Claimant has not worked since his July 2004 incident at work and he has been evaluated for purposes of this award by one of his former treating physicians, Dr. Johnson, and the doctor hired by claimant's attorney, Dr. Edward J. Prostic. In addition, claimant has interviewed with respondent and its insurance carrier's vocational expert, Terry L. Cordray, and the vocational expert hired by his attorney, Karen Crist Terrill. Both Mr. Cordray and Ms. Terrill prepared lists of work tasks that claimant performed in the 15-year period before his low back injuries. And both evaluated claimant's ability to earn wages in the open labor market in light of his permanent low back injury.

Dr. Johnson, who treated claimant for several months in 2004 and who is board-certified in physical medicine and rehabilitation, saw claimant at respondent and its insurance carrier's request for a final assessment in March 2005. The doctor rated claimant under the AMA *Guides*[1] (4th ed.) as having an eight percent whole person functional impairment. At his deposition, the doctor somewhat modified the earlier permanent work restrictions he placed on claimant as he testified that claimant retains the following abilities:

> My opinion is that Mr. Riley can work with some limitations. In my work capacity report completed today I feel that Mr. Riley could work with intermittent rest with sitting, standing and walking. I think he could do frequent, but not continuous, bending and stooping, pushing and pulling. Lifting from 10 to 25 pounds and carrying 10 to 25 pounds. I also feel that he can occasionally lift 26 to 50 pounds and carry 26 to 50 pounds and also occasionally over 50 pounds.[2]

The doctor explained that he modified claimant's restrictions because (1) the two surgeons who examined claimant after August 2004 did not find any instability in claimant's spine, (2) claimant did not undergo surgery, (3) the surgeons deemed claimant had reached maximum medical improvement and (4) it was recommended claimant avoid heavy lifting.

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

[2] Johnson Depo. at 7, 8.

Considering Mr. Cordray's list of claimant's 35 former work tasks, Dr. Johnson determined claimant lost the ability to perform 12 of the 35 tasks (34 percent) when using his latest restrictions. Using the earlier work restrictions that he had recommended in August 2004, Dr. Johnson indicated claimant would have lost the ability to perform two additional tasks for a loss of 14 of the 35 tasks (40 percent).

Dr. Johnson also considered Ms. Terrill's task list. The doctor determined claimant lost the ability to perform 21 of the 43 tasks (49 percent) using the most recent restrictions he formulated for claimant. But claimant would have lost an additional 4 tasks when considering that same task list in light of the August 2004 restrictions.

Dr. Johnson does not believe claimant can return to the type of labor he did for respondent. Rather, the doctor would refer claimant to vocational rehabilitation.

Claimant's attorney hired board-certified orthopedic surgeon Dr. Edward J. Prostic to evaluate claimant for purposes of these claims. Dr. Prostic, who saw claimant in November 2004, concluded claimant had injured a lower lumbar disc. The doctor opined that either or both of the L4-5 and L5-S1 discs was permanently aggravated by the lifting incidents at work from April 11, 2003, through July 12, 2004. Dr. Prostic recommended heat or ice and massage, anti-inflammatory medicines, therapeutic exercises, and repeat epidural steroid injections.

Dr. Prostic recommended that claimant not lift greater than 30 pounds occasionally or 10 to 15 pounds frequently, with all significant lifting performed in the optimal position for the low back, and that claimant should avoid forceful pushing and pulling, repetitious bending or twisting at the waist, use of vibrating equipment and captive positioning.

Based upon the AMA *Guides* (4th ed.), Dr. Prostic initially rated claimant's whole person functional impairment at 14 percent. But at his deposition, Dr. Prostic testified that he might rate claimant at only 10 percent if claimant's range of motion improved for a persistent period of time and did not wax and wane. Nonetheless, claimant's restrictions would not change and his task loss would not change. Moreover, the doctor determined claimant had lost the ability to perform 26 of the 43 tasks (60 percent) identified by Ms. Terrill.

Dr. Prostic seemed to agree that claimant was not a very good candidate for a two-level disc fusion. The doctor explained the procedure is not very reliable in relieving pain. And, more importantly, the surgery would prevent claimant from performing manual labor for the rest of his life, because there is the concern about adjacent segment breakdown. In short, that surgery would not raise claimant's functional level.

As indicated above, both Mr. Cordray and Ms. Terrill considered claimant's potential to earn wages in the open labor market. Ms. Terrill, who only had Dr. Prostic's recommended restrictions, felt claimant could expect to earn between $6.50 and $7 per hour, if he were able to find a job in Southeast Kansas. According to Ms. Terrill, claimant should try to find a job doing light assembly work or, perhaps, light landscaping work, mowing, janitorial work or maintenance. She also suggested that claimant make from 5 to 10 contacts each week and apply at some of the larger employers in Chanute such as the community college, a large manufacturing company and the City of Chanute.

Mr. Cordray, who had both Dr. Prostic's and Dr. Johnson's recommendations, estimated that claimant retained the ability to earn from $8 to $9 per hour. Mr. Cordray felt claimant could perform entry-level positions in the sedentary and light, and some jobs in the medium, labor categories. Appropriate jobs would include being a packer, light truck driving, water truck driver and heavy equipment operator, assembly, light machine operator and hotel maintenance work. And the more recent restrictions from Dr. Johnson would enable claimant to perform the full range of light and medium jobs, which would include an over-the-road truck driver or a delivery truck driver.

As his low back injury is not addressed in the schedules of K.S.A. 44-510d, claimant is entitled to receive permanent disability benefits under K.S.A. 44-510e, which provides in pertinent part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[3] and *Copeland*.[4] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[5]

The Kansas Court of Appeals in *Watson*[6] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[7]

The Board concludes claimant made a good faith effort to find work after he sufficiently recovered from his low back injury. Claimant produced a list of numerous places he contacted for work and also established that he had registered with Job Service to try to find a job. It is true claimant could have recorded more details regarding his job contacts and he could have contacted the larger employers in Chanute regarding work. On the other hand, it is also true respondent and its insurance carrier could have provided

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[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[5] *Id.* at 320.

[6] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[7] *Id.* at Syl. ¶ 4.

claimant with job placement services or vocational rehabilitation to help improve his chances of obtaining employment.

The Board concludes claimant has established he has exerted a good faith effort to find appropriate work. The Board is not persuaded that injured workers should only contact those companies who somehow advertise that they are hiring. Nor is the Board persuaded that workers should only contact or apply at companies advertising jobs that are within their permanent work restrictions. As explained by Ms. Terrill, any contact may potentially lead to a job. And a job opening for a position that a worker may be physically unable to perform may lead to accommodations or an opening of an appropriate job. Indeed, common sense and experience indicate that jobs are sometimes obtained either by the contacts that are made or being in the right place at the right time. Moreover, the parties are aware that respondent and its insurance carrier have the right to seek review and modification in the event claimant finds employment or fails to exert a good faith effort to find appropriate work in the future.

In short, the Board affirms the Judge's finding that claimant sustained a 100 percent wage loss due to his low back injury.

The Board is persuaded by Dr. Johnson's opinions regarding claimant's task loss. As indicated above, Dr. Johnson considered the task lists prepared by both Ms. Terrill and Mr. Cordray. Based upon the doctor's most recent recommended restrictions, claimant sustained a 34 percent task loss using Mr. Cordray's list and a 49 percent task loss using Ms. Terrill's list. The Board is not convinced that either task list is more accurate than the other. Accordingly, the Board averages those percentages and finds claimant sustained a 42 percent task loss.

When the 100 percent wage loss is averaged with the 42 percent task loss, the Board concludes claimant has sustained a 71 percent permanent partial general disability due to his April 11, 2003, accident. Consequently, the Award should be modified.

The parties did not contest Judge Bogart's finding that claimant's whole person functional impairment is 14 percent. Therefore, the Board affirms that finding and adopts it as its own.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[8] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest this decision is that of the majority.

[8] K.S.A. 2005 Supp. 44-555c(k).

AWARD

WHEREFORE, the Board modifies the July 24, 2006, Award entered by Judge Bogart.

Benjamin D. Riley is granted compensation from Advanced Systems Homes, Inc., and its insurance carrier for an April 11, 2003, accident and resulting disability. Based upon an average weekly wage of $469.19, Mr. Riley is entitled to receive the following disability benefits:

For the period ending July 12, 2004, Mr. Riley is entitled to receive 58.10 weeks of permanent partial general disability benefits at $312.81 per week, or $18,174.26, for a 14 percent permanent partial general disability.

For the period from July 13, 2004, through February 21, 2005, Mr. Riley is entitled to receive 32 weeks of temporary total disability benefits at $312.81 per week, or $10,009.92.

For the period commencing February 22, 2005, Mr. Riley is entitled to receive 224.48 weeks of permanent partial general disability benefits at $312.81 per week, or $70,219.59, for a 71 percent permanent partial general disability.

The total award is $98,403.77.

As of December 20, 2006, Mr. Riley is entitled to receive 32 weeks of temporary total disability compensation at $312.81 per week in the sum of $10,009.92, plus 153.39 weeks of permanent partial general disability compensation at $312.81 per week in the sum of $47,981.93, for a total due and owing of $57,991.85, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $40,411.92 shall be paid at $312.81 per week until paid or until further order of the Director.

The record does not contain a written fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee in this matter, counsel must submit the written agreement to the Judge for approval.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Elizabeth R. Dotson, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge
Vincent L. Bogart, Special Administrative Law Judge